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No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE J. CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal from the Appellate Department
of the Superior Court of California,
County of Los Angeles

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE AMERICAN RENTAL ASSOCIATION IN SUPPORT OF APPELLEE

Of Counsel:

SEAN C. CONNORS
District of Columbia Bar

*WILLIAM T. STEPHENS
RICHARD A. GRAHAM
STEPHENS & GRAHAM
1800 Old Meadow Road
P.O. Box 1096
McLean, Virginia 22101
(703) 821-8700

Attorneys for Amicus Curiae
American Rental Association
*Counsel of Record

April 3, 1989

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MOTION OF THE AMERICAN RENTAL ASSOCIATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The American Rental Association ("ARA"), a not-for-profit, membership, national trade association located at 1900 19th Street, Moline, Illinois 61265, hereby respectfully moves for leave to file the attached brief as *amicus curiae*. The consent of the attorney for the appellee, State of California, has been obtained. Appellant, Eugene J. Carella, has not given his consent.

ARA is comprised of approximately 3,600 independent equipment rental businesses throughout the

United States engaged in the business of short-term rentals of an extremely wide variety of equipment and other personal property to the public. The highly diversified lines of equipment include: homeowner items, party supplies and equipment, construction machinery and equipment, vehicles and other mobile equipment (rarely automobiles), durable medical equipment and devices, and exercise and recreational equipment.

ARA's interest in this case arises from the fact that it represents the entire equipment/personal property rental industry. ARA believes that the brief which it is requesting permission to file will afford the Court a broader perspective in defining the constitutionality of statutory inferences and presumptions in criminal theft cases and determining the proper balance between the individual rights of the accused and the property rights of the rental business owner.

The personal property/equipment rental industry, has experienced a strong, steady growth in rental outlets and business volume during the last three decades. ARA estimates that there are at least 15,000 rental outlets (non-automobile) in the United States with annual revenues exceeding $16 billion.[1] Independent equipment rental businesses emerged in the United States immediately following World War II in

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[1] Based on "Audit Report for the 12 Month Period Ending December 1988 for *Rental Equipment Register*," an independent monthly industry magazine, prepared by Business Publications Audit of Circulation, Dec. 31, 1988, 360 Park Ave. S., New York, N.Y. 10010; and the "*Cost of Doing Business Survey-1987*," an independent study prepared by Brown, Bortz and Coddington, 155 S. Madison St., Denver, Colo. 80209, Copyright 1988 American Rental Association.

response to the "do-it-yourself" movement. Many persons entered the business through the building or mechanical trades, drawing upon their experience in the maintenance and repair of power tools, machines and other equipment. The majority of rental stores and "yards" began as the "Mom and Pop" variety, where husband and wife work side-by-side in the business. Today after the second, and even third generations, rental business firms have matured into strong, efficient small business organizations.

Short-term equipment rentals have met growing customer acceptance because of the practical convenience of renting as opposed to owning, especially in connection with more expensive equipment. Renting avoids unnecessary investment, solves repair and maintenance problems, eliminates storage difficulties and is the perfect answer to obsolescence.

The success of the equipment rental industry reflects the *independent* function of the equipment rental firms in the American marketplace.

Along with the rapid growth of short-term equipment rentals, the industry has experienced ever-increasing losses, caused by the "conversion" of rental equipment by dishonest customers. The courts have defined conversion as the unauthorized or wrongful exercise of dominion and control over another's personal property, to the exclusion of, or inconsistent with, the rights of the owner.[2]

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[2] *Catania v. Garage De Le Paix, Inc.*, 542 S.W. 2d 239, 241 (Tex. Civ. App. 1976).

The problem of conversion is unique when compared to other types of theft, in that the property is obtained lawfully, through a bailment transaction evidenced by a rental agreement. By paying a modest deposit or fee, the customer lawfully obtains possession of the property, in contrast to the more common situation where a thief acquires possession through unlawful means in the nature of a trespass. Dishonest customers are seldom deterred from converting rental property because of the ease with which the offense may be committed and the ease of avoiding criminal prosecution or conviction under generic theft laws. This, we submit, is contrary to sound public policy.

ARA supports state statutes and judge-made law which establish guidelines by which juries may distinguish criminal conversion from innocent or negligent failure to return property. Hence, ARA is deeply interested in the use and evolution of statutory inferences and presumptions to establish bench marks, and to insure that they do not infringe upon the constitutional rights of the accused. Our interest is not to relieve the prosecution of *any* burden of proof of *any* element of the offense. On the contrary, we remain dedicated to the preservation of the due process rights of every member of the public. They are the industry's highly valued customers and comprise the very foundation of the rental business.

Many state legislatures have recognized the problem and adopted statutes of various form intended to mitigate the proliferation of the crime. They and their judicial counterparts, will continue to look to the pronouncements of this high Court for guidance in their efforts to achieve the necessary and delicate balancing of the respective rights.

These crucial considerations have prompted ARA's interest in, and desire to contribute to, the Court's deliberations in this case.

Of Counsel:

SEAN C. CONNORS
District of Columbia Bar.

Respectfully submitted,

*WILLIAM T. STEPHENS
RICHARD A. GRAHAM
STEPHENS & GRAHAM
1800 Old Meadow Road
P.O. Box 1096
McLean, Virginia 22101
(703) 821-8700

Attorneys for Amicus Curiae
American Rental Association
*Counsel of Record

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BRIEF OF *AMICUS CURIAE* THE AMERICAN RENTAL ASSOCIATION IN THE SUPPORT OF APPELLEE

INTEREST OF THE *AMICUS CURIAE*

The interest of *amicus* is set out in the foregoing motion.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts by reference the statement of case set forth by appellee.

STATEMENT OF FACTS

On March 25, 1985 Eugene John Carella rented a car from MPG Car Rental (hereinafter "MPG"), located in Beverly Hills, California.[1] The rental agreement was for a 30 day term. The agreement, was introduced into evidence at trial[2] and provided: "RENTER AGREES VEHICLE SHALL BE RETURNED WITHIN 72 HOURS OF DUE DATE OR LEGAL ACTION MAY BE TAKEN." On March 26, 1985, appellant exchanged the car for another and agreed to return the car on April 26, 1985. Subsequently, appellant extended, by telephone, the rental agreement until May 3, 1985. Appellant did not return the car on May 3, 1985.

The owner of MPG, Galil Yaacov, telephoned appellant numerous times after May 3. He even went to the location listed on appellant's business but was never able to contact appellant. It was discovered that appellant did not live at the address listed as his residence in the rental agreement. Appellant actually resided at the business address which he listed on the rental agreement.

Appellant never returned any of the phone messages by Mr. Yaacov. Mr. Yaacov sent a registered letter to both addresses listed by appellant on the

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[1] This Statement is based upon the "Settled Statement" with which Appellant takes issue. The portion of the Settled Statement upon which we rely is found in the Joint Appendix (hereinafter "JA") at 36 - 39. While our Statement has been edited, it is largely based on, and in many places, a verbatim version of the Settled Statement. *Amicus* accepts the regularity of the Settled Statement.

[2] The agreement was not included in the Joint Appendix, but is in the record.

rental agreement. The letter, dated May 16, 1985, demanded the immediate return of the car and was introduced at trial:[3]

> Please return the car you rented from us on MAR. 26, 85 *IMMEDIATELY* to our office at 9047 Wilshire Blvd. or legal actin [sic] will be taken against you as this car will be reported to police as stolen.

The letter addressed to the appellant's residence as shown on the rental agreement was returned by the post office with the notation "Moved, not forwardable." The other letter sent to the appellant's stated business address was not returned to the post office. In the absence of any denial of receipt by appellant, it is reasonable to conclude that he received it.

Mr. Yaacov made continued attempts to reach appellant by the telephone at the business number appellant gave on the rental agreement, leaving a number of messages. Later, this was found to be the telephone number of a hotel. None of the calls were returned by appellant. Mr. Yaacov asked the hotel clerk, who had been taking the messages, if appellant had received the messages that he was leaving. The clerk replied that appellant had received the messages.

On June 3, 1985, Mr. Yaacov reported the theft of the rented car to the Beverly Hills Police Department. Police Detective Schwab attempted to contact the appellant, leaving messages which also were not returned. An arrest warrant was obtained, and on June

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[3] The letter was not included in the Joint Appendix, but is in the record.

27, 1985, appellant was arrested and the car was recovered in the parking lot adjoining appellant's stated business address.[4]

Two witnesses testified for the defense. Appellant's fiancee testified that at the time of the events of this case, she was living with appellant at the address he listed on the rental application as the business address. She testified that she did not remember receiving any messages to return the rented car, although she normally left the "message gathering" duties to appellant.

She testified that she remembered going to a gas station, accompanied by appellant on a Saturday, May 11, 1985, to fill up the rented car with gas, and that it was in the evening hours and close to the MPG rental office. She knew that appellant had a large amount of cash on him at the time, but did not know what he was going to do with the money. She stated that she normally rode the bus and not in appellant's rented car. She knew nothing of the rental agreement.

The second witness to testify for the defense was Jennifer Avres who was employed as a cadet at the Beverly Hills Police Department. She stated that as a part of her duties, she would occasionally answer the telephone. She said that she worked on June 3,

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[4] The car had an excessive amount of mileage on it from the date rented. The brakes were worn down so low that they needed replacement. The car also had minor dents around the body. At no time did appellant ever contact MPG rental office after he extended the return of the car rented May 3, 1985. Appellant never paid for the use of the car other than the initial $400 deposit.

1985, and that she had no memory of whether or not appellant telephoned Detective Schwab.

Appellant introduced no further evidence and offered no explanation of his failure to return the car. He was convicted by the jury of grand theft auto.[5]

SUMMARY OF ARGUMENT

The establishment and use of statutory inferences and presumptions which are permissive in nature do not deny the accused the right of due process under the United States Constitution, Fourteenth Amendment, Section 1. Such statutorily-based inferences are constitutionally sound and should be upheld, so long as the requisite rational relationship between the basic facts and the ultimate facts can be found.

The Court has concluded that a permissive inference is constitutionally unsound only if there is no rational way the trier of facts could make the connection permitted by the inference, a different standard than that used in connection with a mandatory

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[5] While appellant was charged only with a single theft offense, Cal. Penal Code § 487, namely, grand theft auto, along with a motor vehicle code offense, Cal. Vehicle Code § 10851, Vehicle Taking, instructions were given on various theft theories, the elements of which are extremely inconsistent, especially on the intent elements. The jury was instructed on grand theft auto (JA 6), theft by trick and device (JA 11), and theft by embezzlement (JA 12). Grand theft auto and theft by trick require an intent to deprive the owner of property permanently. Embezzlement does not require an intent to deprive permanently. Second, the first two theft offenses appear to require that the intent to deprive be formed at the time of the taking, and not later, unlike embezzlement. But Cal. Vehicle Code § 10855 expressly applies only to embezzlement and Cal. Penal Code § 484(b) applies only to "theft by fraud."

presumption. Thus, any constitutional analysis must begin with a determination of the nature of the presumption.

Two statutes, Cal. Penal Code Section 484(b) and Cal. Vehicle Code Section 10855, gave rise to the jury instructions. Under California law, statutory presumptions are always permissive in nature. The California Supreme Court transformed all presumptions into permissive presumptions in order to preserve their constitutionality, thereby directing California trial courts to instruct such statutory presumptions as permissible inferences. Therefore, if the instructions on the presumptions at issue were given in mandatory form, rather than as permissive inferences, the constitutional defect lies with the instructions, not with the statutory presumptions themselves.

One may easily make the rational connection required to uphold the constitutionality of the statutes giving rise to the instructions at issue here. In connection with Vehicle Code Section 10855, the finding of wilful and intentional conduct is itself, and without more, the elemental or ultimate fact needed to satisfy the government's burden of proof as to intent under the embezzlement theft statute. Since the basic fact is a finding of the full measure of intent needed to prove the crime, it is a logical identity with the elemental fact and, therefore, rational beyond all question. One may certainly infer an unlawful intent to retain property from its unexplained and extended retention in the face of a written demand to return personal property to its rightful owner. As for Penal Code Section 484(b), it is certainly more likely than not that a person, who fails to return property in the face of a written demand for its return and the pas-

sage of a reasonable period of twenty days, has formed an intent to deprive the owner of his property.

Neither the statutes nor the instructions involved at the trial shifted any burden of persuasion to the appellant. Rather, and at most, they shifted only a burden of production, namely the burden of producing some explanation or other evidence tending to explain his failure to return the vehicle to its owner in the face of the written notice warning and the passing of extended periods of time.

Because of the low burden of production imposed by judicially-made California law, the "presumptions" should be analyzed as permissive inferences, and not as mandatory in nature. Under California law, instructions on presumptions such as those involved here *are not to be given* if the defendant produces any evidence responsive to and tending to dispel the presumption. If one presumes that the trial judge in the case at bar followed the law, it follows that the subject instructions were given because of the failure of the appellant to produce any such evidence.

The test for what constitutes a conclusive or irrebuttable presumption includes more than just the language of the instructions on their face. A conclusive presumption removes the presumed element from the case once the State has proven the predicate facts giving rise to the presumption. The issue of intent was not removed from this case by virtue of the jury instructions. First, the jury was required to find special predicate acts apart from the *actus reus* in order to trigger the "presumptions." Second, the jury was instructed that ignorance or an honest and reasonable mistake of fact would render the appellant's acts to be "lawful." Once the instruction is read in light of

the other instructions given, it is clear that the jury was being given a choice.

Amicus submits that when read as a whole, these instructions gave the jury a full and complete understanding of the allocation of burden. The burden of proof beyond a reasonable doubt of each and every element of the offense remained with the prosecution. *In re Winship*, 397 U.S. 358 (1970). This is all the Constitution requires.

ARGUMENT

I. THE PRESUMPTIONS IN THE TWO CALIFORNIA STATUTES ARE PERMISSIBLE INFERENCES, AND THERE IS A RATIONAL CONNECTION BETWEEN THEIR BASIC FACTS AND THE ULTIMATE FACTS PRESUMED.

Amicus submits that the establishment and use of statutory and judge-made inferences and presumptions which are permissive in nature do not deny the accused the right of due process, given the requisite relationship between the basic facts and the ultimate facts. Such inferences and presumptions found in State law do not merely manifest a rational connection between the basic, evidentiary or predicate facts and the elemental or presumed fact. The basic, evidentiary facts, at least most often, are alone capable of supporting a jury conviction beyond a reasonable doubt. Statutorily-based inferences such as those at issue are constitutionally sound and should be upheld. In fact, they should be encouraged as devices which establish standards by which criminal culpability might be predicted by courts, juries, and the public.

The case most central to analysis here is *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). In *Ulster*, the Court analyzed an oft-examined form of presumption that the presence of a gun in a car constitutes "presumptive evidence of its illegal possession by all persons then occupying the vehicle." *Id.* at 142, n.1. The Court noted that the "value" of inferences and presumptions vary from case to case depending upon the "strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Id.* at 156. In assessing the various types of inferences and presumptions, the Court concluded that a permissive inference[6] is constitutionally unsound only if there is "no rational way the trier could make the connection permitted by the inference." *Id.* at 157. The Court set a more rigorous test for mandatory presumptions. Thus, any constitutional analysis must begin with a determination of the nature of the presumption.

A. The California Supreme Court Has Judicially Transformed All Presumptions Arising Under The Criminal Statutes Of The State To Permissive Inferences And Thereby Preserved The Constitutionality Of The Statutory Presumptions Under Attack.

Both the prosecution in presenting its case, and the trial judge in instructing the jury, relied on two statutory presumptions. One is found in Cal. Vehicle

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[6] A "permissive inference" allows, but does not require, the trier of facts to infer the elemental fact from the basic fact, and imposes no burden upon the defendant. *Ulster*, 442 U.S. at 156-7.

Code Section 10855, which deals specifically with vehicles, and declares:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

The other is found in Cal. Penal Code Section 484(b), which deals with all rental property in general, and reads:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Under California law, presumptions such as the above are *always* permissive in nature. In *People v. Roder*, 33 Cal.3d 491, 189 Cal.Rptr. 501 (1983), a case involving a statutory presumption relating to a presumption of guilty knowledge of a second hand property dealer under prosecution for receiving stolen property, the California Supreme Court expressly considered the effect of *Ulster* and *Sandstrom v. Montana*, 442 U.S. 510 (1979) in evaluating the statutory presumption. The court concluded that the presumption would be mandatory given this Court's decisions in *Ulster* and *Sandstrom* and the State's own Evi-

dence Code. However, in order to preserve the constitutionality of that presumption and similar presumptions such as the two here, the court held that existing California criminal statutory presumptions should be "pare[d] down . . . to constitutionally permissible limits, rather than to abrogate them altogether." *Roder*, 658 P.2d at 1312. Thus, the court, by law, "transformed" the statutory, rebuttable presumptions[7] into permissible inferences, thereby directing California trial courts to instruct such statutory presumptions as permissible inferences. The court reasoned:

> First, preservation of the statutory provisions in a restrained form will still enable the court to inform the jury of an inference which the Legislature—drawing on its general experience—has concluded can often reasonably be drawn from proof of the basic facts (cf. *United States v. Gainey*, *supra*, 380 U.S. 63, 67, 85 S.Ct. 754, 757, 13 L.Ed.2d 658); elimination of the device would deprive the jury of any legislative guidance in circumstances in which direct evidence of actual guilty knowledge will rarely be available. (See generally ALI, Model Pen.Code, § 223.6, coms. 1, 4(d), pp. 232, 241-245.) Second, even as a permissive inference, the statutory provision will serve an important substantive function in regulating the conduct of secondhand dealers, inducing such dealers to make reasonable inquiry when they are offered

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[7] Prior to the decision in *Roder*, statutory presumptions such as § 10855 of the California Vehicle Code were considered to be mandatory, but not conclusive, presumptions.

> property that may be stolen. (Blakely & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform* (1976) 74 Mich.L.Rev. 1511, 1572-1589.) The state has a strong interest in encouraging dealers to conduct their business in this fashion in order to make it more difficult for thieves to dispose of their wares, and it appears appropriate to interpret section 496 to preserve this interest insofar as is constitutionally permissible.

Roder, 658 P. 2d at 1313.

Roder is a clear-cut departure from *Sandstrom*. In *Sandstrom*, the Court avoided the contention that the instruction involved was a permissive inference or even if mandatory, that it shifted only the burden of production and not the burden of persuasion. *Id.* at 515-516. Key elements in the Court's determination were the instruction's mandatory language and the Montana rules of evidence dictating that a presumption could be overcome only by the preponderance of evidence contrary to the presumption.

The operative standard under the law of the State of California has been the reverse of that of the State of Montana since the California Supreme Court's decision in *Roder* in 1983. Therefore, if the instructions on the presumptions at issue were given in mandatory form, rather than as permissive inferences, the constitutional defect lies with the instructions, not with the statutory presumptions themselves when read in light of *Roder*.

B. There Is A Rational Connection Between The Basic Or Evidentiary Facts And The Elemental Or Ultimate Facts, As Required By *Ulster* And The Elemental Facts Are More Likely Than Not To Flow From The Basic Facts.

We turn to examine the rational connection between the basic or evidentiary facts and the ultimate or elemental facts, as required by *Ulster*.[5] One may easily make the rational connection for permissive inferences in this case. In short, the elemental facts in both of the presumptions in question are "more likely than not" to flow from the basic facts. *Id* at 165, quoting *Leary*, 395 U.S. at 46.

The presumption in Cal. Penal Code Section 484(b)[6] provides guidance to a jury as to when they should draw an inference. The prosecution is required to prove the predicate facts, namely, a written demand and a further twenty day delay, in order to gain the benefit of the presumption, or more accurately, in-

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[5] One analytical difficulty arises at this point. It is our position that the statutes giving rise to the presumptions here suffer from no constitutional infirmity because of *Roder*. Therefore, the only issues remaining relate to the instructions, as given, not the statutes. However, in *Ulster*, the Court held that the analysis of the rational basis of the inference involved should be based on the "more likely than not" test found in *Leary v. U.S.*, 395 U.S. 6, 46 (1969), and the facts of the case before the Court, rather than on a facial basis. Since the instructions given may have departed from *Roder*, we will undertake the analysis of the rational basis of the inference at issue for the purpose of determining the statute's constitutionality on the basis of the statute and the evidence, rather than by reference to the instructions.

[6] Also given as "PEOPLE'S SPECIAL INSTRUCTION # 1—Presumption Respecting Theft by Fraud." JA 15.

ference as to the ultimate or elemental fact of intent. It must be recognized that a jury is free to draw an inference regarding the intent of appellant from a written demand and the passage of a reasonable period of time under the general jury instruction concerning circumstantial evidence. Such an inference would clearly have been reasonable here. For instance, if the jury believed that appellant had received the May 16, 1985 letter, which demanded "immediate" return of the vehicle, they would have been free to conclude that Mr. Carella had formed the requisite intent to defraud or embezzle immediately following that date when he did not return the vehicle.

A similar analysis may be applied in connection with the presumption contained in Cal. Vehicle Code Section 10855.[10] That section provides as follows:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Despite the use of the word, this may not even be a presumption at all because of its absolute dependence on wilfulness and intention. In order to trigger the "presumption" the jury must find, as a predicate fact, that appellant's failure to return the leased vehicle was *wilful and intentional*.[11] The finding of wilful and

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[10] "PEOPLE'S SPECIAL INSTRUCTION # 2—Presumption Respecting Embezzlement of a Leased or Rented Vehicle." JA 15.

[11] In *People v. Cloward*, 196 Cal. App. 2d 669, 16 Cal. Rptr.

intentional conduct is itself, without more, the elemental or ultimate fact needed to satisfy the govern-

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772 (Cal. Ct. App. 1961), the court discussed Section 10855 of the Motor Vehicle Code:

> The presumption declared by section 10855 is not conclusive. It is prima facie and is rebuttable. A statute may validly declare a prima facie presumption to be the legal effect of the proof of certain facts. However, the due process clause of the Fourteenth Amendment requires that there be a rational connection between the facts proved and the fact presumed. (*People v. Wells*, 33 Cal. 2d 330, 346 [202 P. 2d 53].)
>
> Under section 10855 the facts to be proved are that a person has leased or rented a vehicle and that he has *willfully and intentionally* failed to return the vehicle to the owner within five days *after the lease or rental agreement has expired*. "Willfully" means done with a purpose or willingness to commit the act. (Pen. Code, § 7, subd. 1.) "Intentionally" means done with intention of purpose, intended, designed. (*People v. McCree*, 128 Cal. App. 2d 196, 202 [275 P. 2d 95].) Mere proof of negligent failure to return the vehicle would not raise the presumption. We think it manifest there is a rational connection between the facts proved and the fact presumed. (See cases collected, 15 West's Cal. Dig., Crim. Law. Section 307.) The presumption is based on past experience and reasonable probabilities.
>
> * * *
>
> A presumption is defined as a 'deduction which the law expressly directs to be made from particular facts.' (Code Civ.Proc., Section 1959.) Thus, a presumption is based on a fact or facts and not upon mere surmise or conjecture—and certainly the facts giving rise to the presumption were here shown to exist. Presumptions are legislative determinations of reasonable probabilities. What experience has shown has normally happened in the past, under the same conditions will normally happen again. Simply because a criminal instead of a civil case is involved does not require

ment's burden of proof as to intent under the embezzlement theft statute. This presumption is thus distinguished from those found in *Sandstrom* and *Francis v. Franklin*, 471 U.S. 307 (1985).[12] Since the predicate act and the ultimate or elemental fact are a single identity under the law, the presumption in this case, based upon Vehicle Code Section 10855, was redundant as to the element of intent. Here, the presumption is triggered by an actual finding that the defendant "wilfully and intentionally failed to return the vehicle" and the passage of five days.[13] Since the basic fact is a finding of the full reason of intent needed to prove the crime, it is a logical identity with the elemental fact and, therefore, rational beyond all question.[14]

In connection with the presumption under Penal Code Section 484(b), the rational connection between the basic fact needed to trigger the presumption,

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> the jury to disregard, in their reasoning, the reasonable probabilities that the Legislature has determined exist from certain facts . . . .

Cloward, 196 Cal. App. 2d at 672 - 673.

[12] Indeed, under California law the specific intent to prove embezzlement does not require proof of an intent to *permanently* deprive the owner of possession of a leased vehicle. Rather, the state must prove only that the person fraudulently appropriated or converted the vehicle to his own use, i.e., he wilfully and intentionally failed to return the vehicle, in other words, intended not to return it.

[13] The passage of five (5) days, in addition to a finding of the requisite intent, is more than would otherwise be required.

[14] The crime of embezzlement is unlike theft, in that intent at the outset of possession is unnecessary and trespass is not an element.

namely, the demand letter and the twenty day period, and the elemental fact of intent to commit theft, is similarly strong. Certainly one may reasonably infer an unlawful intent to retain property from its unexplained and extended retention in the face of a written demand to return personal property to its rightful owner.

Mr. Carella rented a car and failed to return it after an extended due date of May 3, 1985, and further after twenty days from the demand letters of May 16, 1985, until June 27, 1985 when the automobile was finally recovered by the police.

Had no jury instructions regarding statutory presumptions been given, there was ample evidence in the record for the jury to convict appellant of embezzlement beyond a reasonable doubt. Any inference needed to establish the level of intent required for conviction under California law could have readily been drawn. It follows that the legislature has concluded that it is "more likely than not" that a person who fails to return personal property after the agreed due date and after a demand letter plus twenty days, intends to convert the property to his own use.

Given the standard instruction to the jury concerning direct and circumstantial evidence, the "deduction of fact"[15]—that Mr. Carella "fraudulently appropriated or converted [the car] to his own use or purpose"[16]—was "logically and reasonably . . .

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[15] "COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS." JA 18-19.

[16] "THEFT BY EMBEZZLEMENT—DEFINED." JA 12.

drawn"[17] in light of his unexplained failure to return the rented car and in the face of specific written demand and warning.

II. WHILE THE JURY INSTRUCTIONS MAY HAVE SHIFTED THE BURDEN OF PRODUCTION TO APPELLANT, NO BURDEN OF PERSUASION WAS SHIFTED, AND SINCE A MINIMAL PRODUCTION BY APPELLANT WOULD HAVE DISSIPATED THE PRESUMPTIONS, THE COURT SHOULD TREAT THEM AS PERMISSIBLE INFERENCES DESPITE THEIR LANGUAGE.

Neither the statutes nor the instructions involved at the trial shifted any burden of persuasion to the defendant. Rather, and at most, they shifted only a burden of production, namely, the burden of producing some explanation or other evidence tending to explain his failure to return the vehicle to its owner in the face of the written demand and warning, and the passing of an extended period of time. Even a low level showing in this regard would have dissipated the presumptions and no instruction on them would have been required, appropriate, or, we can reasonably conclude, given by the court. Furthermore, when the instruction was given, it was counterbalanced by another jury instruction concerning innocent conduct:

> An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if he commits an act or omits to act under an

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[17] "COMPOSITE BASIC INSTRUCTION FOR MISDEMEANOR TRIALS." JA 18-19.

> honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.[18]

Merely a minimal burden of production, and no burden of persuasion, was ever shifted to the defendant. Appellant was a practicing lawyer and a member of the Bar of this high Court.[19] He chose not to afford the court and the jury even the slightest explanation or other evidence as to his refusal to return the car to its rightful owner, which would have dissipated the statutory "presumptions" and thereby eliminated any instructions on them to the jury.

A. The Presumptions, As Given In The Instructions, Were Not Mandatory In Nature.

The nature of mandatory presumptions was explained in *Ulster*, where the Court stated that mandatory presumptions tell the trier of the fact "that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ulster*, 442 U.S. at 157. However, the Court noted that:

> To the extent that a presumption imposes an extremely low burden of production—e.g., being satisfied by "any" evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally

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[18] "IGNORANCE OR MISTAKE OF FACT." JA 9.

[19] *Who's Who in American Law*. JA 52. *See*, 5th Ed. 1987-88 at 119.

Mullaney v. Wilbur, 421 U.S. 684, 703 n. 31, 95 S.Ct. 1881, 1892 n. 31, 44 L.Ed.2d 508.

> In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.

Id. 442 U.S. at 157, n.16. This question was expressly avoided by the Court in *Francis*.[20] Because of the low burden of production imposed by judicially made California law necessary to negate *in toto* the "presumptions," they should, in fact, be analyzed as permissive inferences, and not mandatory in nature.

B. Under California Law, The Instruction On The Statutory Presumptions Could Be Given Only Because There Was No Evidence Introduced Which Tended To Controvert Them.

Amicus submits that California law concerning instructions on presumptions is crucial to the analysis. Under California law, instructions on criminal statutory presumptions *are not to be given* if the defendant produces any evidence responsive to, and tending to dispel the presumption.[21] In *People v. Hedrick*, 105

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[20] "We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question." *Francis*, 471 U.S. at 314, n.3.

[21] It appears that in some states an instruction on a presumption may be given once sufficient evidence has been introduced into the record to support a finding of the predicate acts of the presumption and without regard to whether the defense

Cal. App. 3d 166, 164 Cal. Rptr. 169 (Cal. Ct. App. 1980), a case involving Penal Code Section 484(b), the court ruled:

> The presumption should have disappeared from the case when the defendant testified regarding his understanding of the return date for the car and the jury should not have been instructed on the presumption.

Hedrick, 105 Cal. App. 3d at 171. Again, in *People v. Hemmer*, 19 Cal. App. 3d 1052, 97 Cal. Rptr. 516 (Cal. Ct. App. 1971) the court had ruled similarly:

> With evidence sufficient to support a finding of the lack of intent to commit theft by fraud, the presumption disappeared from the case, and an instruction as to its effect should not have been given.* The legislative committee comment on Evidence Code Section 604, describing the effect of a presumption affecting the burden of producing evidence, notes: "Such a presumption is merely a preliminary assumption in the absence of contrary evi-

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produces or has produced any evidence in response and may, even itself, be considered as evidence. 29 Am. Jur. 2d *Evidence* § 166 (1967). In the State of California, an instruction on a presumption which shifts the burden of production is given only if the defense produces no evidence in response to the predicate acts evidence and presumptions attaching thereto. The presumption and resulting instruction impose no burden of persuasion and do not adversely impact or derogate the presumption of innocence. Such instructions are much more closely allied conceptually with jury instructions commonly given where the law recognizes and imposes a duty to produce on a particular party because that party is best able to cause production and does not. They are often given on inferences arising from missing witness, possession of recently stolen property, and flight.

dence, i.e., evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict . . . ."

"If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions . . . ."

Thus, if there is evidence sufficient to support a finding of the nonexistence of the presumed fact, the presumption disappears and no instruction should be given. (See CALJIC (3d ed.) Appendix B.)

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* "The unique feature of a Thayer presumption is that it has no further function; once the opponent satisfies the burden of producing evidence, the presumption vanishes and the action proceeds as if the presumption never existed." (Note, *The California Evidence Code, Presumptions*, 53 Cal.L.Rev. (1965) 1439; see Thayer, Preliminary Treatise on Evidence (1898) pp. 313-352.)

Hemmer, 19 Cal. App. 3d at 1061.

If one presumes that the trial judge in the case at bar followed the law, it follows that the subject in-

structions were given because of the failure of the defendant to produce any such evidence. In effect, Mr. Carella, a practicing attorney and member of this Court, either sat on his rights or had no explanation or responsive evidence.[22] It was for that reason, and that alone, that the instructions could be given. Under these circumstances, and especially in light of the minimal threshold level of production needed to dissipate the presumption, *amicus* submits that this Court should treat and analyze the presumptions the same as permissible inferences or bench marks against which the jury was to gauge their inference-drawing.

III. THE JURY WAS NOT INSTRUCTED TO A CONVICTION THROUGH THE USE OF A CONCLUSIVE PRESUMPTION WHICH WOULD HAVE REMOVED AN ELEMENT OF THE CRIME FROM CONSIDERATION AND WOULD HAVE ENABLED THE PROSECUTION TO OVERCOME ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

The jury in this case was never instructed as to the meaning of the words, "presumption" or "presume." The common definitions of "presume" found in authoritative dictionaries make no reference to the legal mandate which lawyers, legal scholars and judges sometimes attach to the word "presume."

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[22] We note that under California law, an intent to return property at some future time is *not* a defense to an embezzlement-based theft charge. See Cal. Penal Code § 512. This is also apparent from the fact that an intent to deprive the rightful owner of possession *permanently* is *not* an element of embezzlement. Compare JA 6 and JA 12. Thus, the instructions for grand theft auto and embezzlement were internally inconsistent, and may well have led to the jury's confusion and note. While the jury asked about the "legal requirement of permanent deprivation of possession," permanent deprivation was not even required to prove embezzlement.

The Court in *Sandstrom* reviewed the dictionary meaning of the word "presume" and found it to mean "to suppose to be true without proof." 442 U.S. at 517. To "suppose," according to Webster's Ninth New Collegiate Dictionary (1985) at 1186 is "to lay down tentatively as a hypothesis, assumption or proposal." *Amicus* suggests that to impute to the mind of a "reasonable juror," such a mandated legal conclusion from a mere reading of the word, "presumed" in a criminal statute would be to blink at reality.

One need only read the extensive and erudite definitions and discussions of the meaning of presumptions in *Ulster*, *Sandstrom* and *Francis*, from an untutored perspective, to understand this fallacy.

A. The Jury Instructions Did Not Remove The Issue Of Intent From The Case.

Neither did the jury instructions create a conclusive presumption which infringed upon the paramount presumption of innocence of the defendant. The test for what constitutes a conclusive or irrebuttable presumption includes more than just the language of the instructions on their face. In *Ulster*, the Court distinguished mandatory presumptions from permissive inferences on the basis of merely the language. Further, in *Francis*, the Court stated:

> A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.

Francis, 471 U.S. at 314, n.2.

But the issue of the intent was not removed from this case by virtue of the instructions, *in toto*, given to the jury. On the contrary, the jury was instructed:

> IGNORANCE OR MISTAKE OF FACT
>
> An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime.
>
> Thus a person is not guilty of a crime if he commits an act or omits to act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act or omission lawful.

JA 9.

It does not follow that the instructions were conclusive of the issue of intent and removed it from the case, when the jury was expressly told that appellant was "not guilty" if he acted under an honest and reasonable belief.

Even assuming *arguendo* that the Court were to conclude that the language of the jury instructions here was as conclusive as the language examined in *Sandstrom*, we submit the that a critical difference exists between this case and *Sandstrom* which compels a different result. In *Sandstrom* and the two cases upon which it based its analysis, *Morrissette v. United States*, 342 U.S. 246 (1952) and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the presumptions involved enabled the prosecution to prove the *mens rea* element of the offense solely by virtue of the presumption alone and proof of the mere *actus reus*. In other words, in those cases, once the

prosecution proved the non-intent elements of the criminal act itself, the instructions enabled the jury to *presume* criminal intent in a logical leap that required no other evidence at all. In *Sandstrom*, the jury was able to presume from the act of killing, alone, that the defendant acted "deliberately." In *Morrissette*, the jury was able to presume "wilful and knowing" intent from the trespass constituting the taking of government property. In *U S. Gypsum*, the jury had been permitted to presume an intent to fix prices from the effect of an exchange of pricing information. In each of these cases, the government was relieved of the burden of proving beyond a reasonable doubt intent, the mental element of the offense. The jury was effectively "directed to find against defendant on the element of intent." *Winship*, 397 U.S. at 364. Since the State was not forced to prove intent beyond a reasonable doubt, "the defendant was deprived of his constitutional rights as explicated in *Winship*." *Sandstrom*, 442 U.S. at 523.

The presumptions involved in the case at bar are readily distinguishable. First, the jury was required to find specific predicate acts in addition to the *actus reus* in order to trigger the conditional "presumptions." Under the Penal Code Section 484(b), the jury was required to find (1) a written demand and (2) the passage of twenty days without return of the rental car in order to activate the presumption. Second, the jury was instructed that ignorance or an honest and reasonable mistake of fact would render the defendants acts to be "lawful." This is almost the converse of the instruction given in *Sandstrom*. Here, the jury was effectively told that it should acquit ap-

pellant if the jury found that appellant's conduct flowed from his reasonable mistake or ignorance.

B. The Jury Instructions As A Whole Cure Any Constitutional Error Found In The Instructions On The Statutory Presumptions.

The jury was told: "[t]he instructions are to be considered as a whole and each individual instruction is to be considered in the light of all the others."[23] When viewed as a whole, the instructions to the jury were not the equivalent of a directed verdict or legal conclusion. *Francis*, 471 U.S. at 318 - 325. It is abundantly clear that the jury was given a choice. As the Court held, "[t]he jury, of course, did not hear only the two challenged sentences." *Francis*, 471 U.S. at 318. On the contrary, *amicus* submits that the instructions, when taken as a whole, "explained the proper allocation of burden with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Id.* at 319.

The jury here was told of the elements of the offense, and that it was the State's burden to prove guilt beyond a reasonable doubt. JA 21. While the jury was instructed as to the presumptions, it was only because there was no evidence in the record tending to rebut the presumptions. Finally, the trial court instructed the jury concerning the effect of ignorance, innocent conduct and mistake of fact. JA 9. In other words, the instructions on the presumptions predicated on the two California statutes were not given in a vacuum or without a counterbalancing of instructions. Indeed, when read as a whole, the in-

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[23] JA 18.

structions informed the jury in very real and meaningful terms of the impact of contravening evidence. The burden of proof of each element of the offense beyond a reasonable doubt remained with the prosecution. The prosecution carried that burden of proof beyond a reasonable doubt by establishing, without more, the predicate or basic facts. *In re Winship*, 397 U.S. at 364. This is all the Constitution requires.[24]

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[24] Even if constitutional error were found, it does not follow, contrary to an implication in *Sandstrom*, that the error cannot be harmless. In *Rose v. Clark*, 478 U.S. 570 (1986), the Court expressly considered this question, and held that a *Sandstrom* error can be found harmless under *Chapman v. State of California*, 386 U.S. 18 (1967). The Court held that:

> As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S., at ___, 106 S.Ct., at 1436; *United States v. Hasting, supra*, at 508-509, 103 S.Ct., at 1980.
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> * * *
>
> We therefore find that the error at issue here—an instruction that impermissibly shifted the burden of proof on malice—is not "so basic to a fair trial" that it can never be harmless. Cf. *Chapman*, 386 U.S., at 23, 87 S.Ct., at 828.
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> The purpose behind the rule of *Sandstrom v. Montana* supports this conclusion. *Sandstrom* was a logical extension of the Court's holding in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that the prosecution must prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *Id.*, at 364, 90 S.Ct., at 1073; see *Sandstrom*, 442 U.S., at 520, 523, 99 S.Ct., at 2457, 2458; *Francis v. Franklin*, 471 U.S., at ___, 105 S.Ct. at ___. The purpose of that rule is to ensure that only the guilty are criminally punished. As the Court stated last term in *Francis v. Franklin*, the rule "protects the 'fundamental value determination of our so-

CONCLUSION

For the foregoing reasons, the decision of the Appellate Department of the Superior Court of California, County of Los Angeles should be affirmed.

Respectfully submitted,

Of Counsel:

SEAN C. CONNORS
District of Columbia Bar

*WILLIAM T. STEPHENS
RICHARD A. GRAHAM
STEPHENS & GRAHAM
1800 Old Meadow Road
P.O. Box 1096
McLean, Virginia 22101
(703) 821-8700

Attorneys for Amicus Curiae American Rental Association
*Counsel of Record

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ciety,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty one go free.' " *Ibid.*, quoting *Winship, supra*, at 372, 90 S.Ct., at 1077 (Harlan, J., concurring). When the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves.

Rose, 478 U.S. at 578 - 580.